

1997

RUF, INC. a Utah corporation v. Icelandic Investments, Inc. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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CKET NO. 970691-CA

IN THE UTAH COURT OF APPEALS

RUF, INC., a Utah corporation,)
DONALD M. DUDLEY, an individual,)
and WILLIAM GRUBER, an)
individual,)

Plaintiffs/Appellants,)

v.)

ICELANDIC INVESTMENTS, INC., a)
Utah corporation, ROBERT)
JOHNSON, an individual, and)
VR UTAH, INC. dba VR BUSINESS)
BROKERS, a Utah corporation,)

Defendants/Appellees.)

Case No. ⁹⁷~~96~~0691 CA

Priority No. 15

SUPPLEMENTAL ADDENDUM TO BRIEFS OF APPELLEES

Appeal from the Judgments of the Third Judicial District Court,
Salt Lake County, the Honorable Stephen L. Henriod, presiding,
District Court Case No. 93-0903578

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Icelandic Investments, Inc.,
and Robert Johnson

FILED
SEP 24 1998

Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

RUF, INC., a Utah corporation,)	
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and WILLIAM GRUBER, an)	
individual,)	Case No. ⁹⁷ 960691 CA
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Utah corporation, ROBERT)	
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EXHIBIT A

AGREEMENT FOR SALE OF ASSETS

AGREEMENT made and entered into by and between ICELANDIC INVESTMENTS, INC. ("SELLER") 1826 South 240 West, Orem, Utah 84058, and RUF, INC. ("BUYER") and DONALD M. DUDLEY and WILLIAM J. GRUBER (collectively "GUARANTORS") 11949 South Nicklaus Road, Sandy, Utah 84092, for purchase and sale of a business known as USA SWINGS with usual places of business at 200 West 975 North, Orem, Utah 84057 and a retail sales location at 296 East 6400 South, Murray, Utah 84107, all as their respective interests exist and are herein represented.

R E C I T A L S

A. SELLER is a manufacturer and retail dealer of playground equipment business at said aforementioned addresses and is desirous of selling certain assets of the same to BUYER as an on going business concern; and

B. BUYER is desirous of purchasing said assets and continuing the operation of said business at the same locations on the terms contained herein.

NOW THEREFORE, for good and valuable consideration and in consideration of the covenants, agreements, terms, and provisions contained herein, the parties agree as follows:

ARTICLE I: SALE OF ASSETS

SELLER hereby sells and conveys, and BUYER hereby purchases and acquires all of the following assets, property, and items as owned by and used in connection with the business of the SELLER known as USA SWINGS at 200 West 975 North, Orem, Utah 84057 and 296 East 6400 South, Murray, Utah 84107.

- a. All inventory and merchandise of the business.
- b. All of the furniture, fixtures, equipment, supplies, and furnishings which are described in the Bill of Sale attached hereto as Exhibit "A".
- c. All of the goodwill of the SELLER, including the exclusive rights to the name USA SWINGS; together with all policy manuals, price lists, supplier lists, customer lists, or trade secrets to the extent they exist, training to be provided to BUYER, and the Covenant Not To Compete.
- d. SELLER hereby assigns and transfers the following trade names and registered trade marks: USA Swings, T-Swing Climber (Registered), Monkey Bar Tswing (Registered), Monkey Tswing (Registered), Tswing (Registered) and Tee Swing (Registered). All evidence of ownership and trade mark registration are attached hereto as Exhibit "B".

ARTICLE II: ASSETS TO BE RETAINED BY SELLER

SELLER shall retain all right, title, and interest in and to the following items:

- a. All cash on hand or on deposit including any real

property lease deposit.

b. All notes payable, accounts payable, accounts receivable, prepaid expenses, and utility deposits.

c. All tax rebates, insurance claims and credits from suppliers.

ARTICLE III: PURCHASE PRICE

BUYER agrees to pay SELLER or its assigns, and SELLER agrees to accept as the full purchase price for all the singular assets to be sold as set forth in Article I above, the total purchase price of EIGHTY TWO THOUSAND FIVE HUNDRED FORTY SIX AND NO/100 DOLLARS (\$82,546.00). The purchase price includes inventory at cost value. The BUYER has satisfied itself concerning the amount of inventory and its condition from an inventory that took place on September 7, 1990.

ARTICLE IV: ALLOCATION OF PURCHASE PRICE

The purchase price shall be allocated in the following manner:

\$ 9,446.00	For Article Ia assets
\$58,000.00	For Article Ib assets
\$15,100.00	For Article Ic assets

ARTICLE V: PAYMENT OF PURCHASE PRICE

The purchase price as hereinabove set forth in Article III, above shall be paid in the following manner:

\$ 5,000.00	Previously deposited and held in escrow by VR Utah, Inc.
\$27,546.00	At the time of closing by cash, cashier's check, or other acceptable cash equivalent, non-refundable after closing.
\$50,000.00	Promissory Note bearing interest at 10% per annum from September 12, 1990 payable in one hundred twenty (120) equal monthly installments of \$660.75 with a first payment due October 12, 1990 and continuing the same day of each month thereafter until all principal and interest are paid in full.

The said Promissory Note is attached hereto as Exhibit "C" and the Security Agreement securing payment of said Promissory Note is attached hereto as Exhibit "D".

ARTICLE VI: SALE FREE AND CLEAR

SELLER and BUYER agree to waive all the conditions and requirements of the Bulk Transfer Act; but SELLER shall complete and execute the affidavit annexed as Exhibit "E" which is a list of all debts owed by SELLER'S business. All such debts shall be paid at closing or within twenty (20) days thereafter.

SELLER agrees that any and all debts, liens, encumbrances, security agreements, tax liens, or attachments of record shall be fully discharged at time of closing including those set forth on Exhibit "F".

ARTICLE VII: LIABILITIES

SELLER shall pay, assume and hold BUYER harmless from all debts and liabilities and indemnify and hold BUYER harmless from all claims and causes of action arising prior to possession by

the BUYER on September 12, 1990. Robert Johnson and Richard Johnson hereby agree to personally indemnify BUYER for said claims and causes of action of SELLER for a period of one (1) year and in an amount not to exceed \$37,100.00 plus principal paid on Promissory Note (Exhibit "C").

SELLER agrees to cause any and all known and liquidated debts of the USA SWINGS business to be paid from the proceeds of sale by making full payment to all creditors, and to provide BUYER a confirmation of payment in writing at the time of payment or within twenty (20) days thereafter. BUYER is relieved of all payments until such written confirmation is received.

BUYER shall pay, assume and hold SELLER harmless from all payments, debts, claims and liabilities arising after possession by BUYER.

In the event any claim is made against BUYER, BUYER shall provide SELLER reasonable and timely notice of same. SELLER shall thereafter defend against said claim at SELLER'S own expense. In the event SELLER shall fail to so defend, or BUYER shall otherwise incur any loss, including but not limited to attachment, or other sequestration on any asset sold, then BUYER may upon prior notice to SELLER pay, settle or otherwise discharge said asserted claim. If the BUYER thus discharges a claim against SELLER, at BUYER'S election, BUYER shall have the right of offset to BUYER'S future obligation under the Promissory Note due to SELLER or may demand that the SELLER, within thirty (30) days, fully reimburse BUYER for all sums expended in

discharging said claim. Such right of offset or reimbursement shall include all reasonable attorney fees and costs required in settling or defending against such claim.

The provisions of this Article shall not extend to obligations expressly to be assumed by BUYER and shall not apply to asserted claims for which adequate insurance coverage is available. This agreement, however, shall otherwise be unlimited as to amount and duration.

ARTICLE VIII: DEFAULT

In the event any party to this Agreement defaults on any term or provision incorporated herein, including any provision of any Exhibit attached hereto, the nondefaulting party shall give the defaulting party a written notice requiring that such default be cured within thirty (30) days after receipt of said written notice, which notice shall require the cure to be made within a specific time not more than thirty (30) days. After such period, the nondefaulting parties may take the remedies set forth in this Agreement and any attachments hereto. If the defaulting party fails to cure the default within such thirty (30) day period, the nondefaulting party may immediately enforce its remedies as described in this Agreement or in any of the Exhibits attached hereto.

ARTICLE IX: SELLER'S WARRANTIES

The SELLER warrants and represents to BUYER with knowledge,

and BUYER may rely on the same to enter into this transaction, each and all of the following:

1. That the SELLER owns and is or will sell all of the assets being sold hereunder free and clear of any interest, lien, or encumbrance, except as set forth on Exhibit "F", "Liens and Encumbrances", which shall be paid at closing.

2. That the SELLER has full right and authority to enter into this agreement and right to perform and sell hereunder.

3. That there are no known eminent domain or condemnation proceedings affecting any real property or common areas of the business.

4. That at the time of sale all equipment or other apparatus subject to a lease or sold to BUYER shall be in good working order upon the date of possession. BUYER agrees that such items are purchased in used condition.

5. That there are no known governmental, administrative, or litigation proceedings against SELLER, which have arisen in connection with its conduct of the business.

6. Icelandic Investments, Inc. is duly formed and in good standing in the State of Utah.

ARTICLE X: POSSESSION

SELLER agrees and covenants that it shall deliver possession of the business on September 12, 1990.

ARTICLE XI: COVENANT NOT TO COMPETE

SELLER agrees and covenants that it shall not compete with the manufacturer of playground equipment business being transferred herein; pursuant to the terms of the Covenant Not To Compete Agreement which is annexed hereto as Exhibit "G".

ARTICLE XII: SELLER'S OBLIGATION BETWEEN CLOSING AND POSSESSION

SELLER agrees, warrants, and covenants that during any period of time which may elapse between closing and possession:

1. SELLER shall maintain customary business hours.
2. SELLER shall maintain its customary and usual pricing and promotional programs.
3. SELLER shall adequately maintain any necessary stock required to maintain the goodwill of the business.
4. SELLER shall not conduct any liquidation or so-called close-out sales.

Acceptance of the bill of sale shall be presumptive evidence of satisfaction of this Article XII. In the event of any asserted breach, BUYER shall give SELLER written notice and SELLER shall cure within fifteen (15) days thereafter. In the event SELLER shall not so cure, then BUYER shall have the option to terminate this Agreement without further recourse to either party thereto.

ARTICLE XIII: CASUALTY

It is further provided that if prior to closing and

possession there is any casualty, destruction, or loss to assets described in Article I in an amount equal to or in excess of ten (10%) percent of the total value; then in such instance this Agreement may be terminated at the election of BUYER, unless said assets or premises shall, before the date of closing be restored or replaced to their former condition.

ARTICLE XIV: CONDITIONS PRECEDENT- CONCURRENT-AND-SUBSEQUENT

This Agreement and all BUYER'S obligations hereunder shall be fully conditional upon the occurrence of the following which shall survive closing:

1. It is expressly agreed that this Agreement and any leases provided, assigned or obtained by SELLER shall be mutually dependent; and BUYER shall not be obligated to perform under this Agreement without benefit of said leases and delivery of possession of the property which is the subject of said leases; and reciprocally, BUYER shall have no rights under said leases unless this sale is concluded.

2. SELLER and BUYER agree that SELLER will provide leases on the real property owned by the SELLER at the Orem and Murray locations on the terms and conditions set forth in the leases contained in Exhibit "H" attached hereto.

ARTICLE XV: BROKERS

The parties warrant and represent to each other that VR Business Brokers is a party to this transaction and entitled to

commission to be paid by SELLER.

ARTICLE XVI: ADJUSTMENTS

The parties agree that at the time of closing they shall prorate and adjust all allocable and other expenses subject to adjustment in the following manner:

1. Any merchandise ordered by SELLER prior to possession but received by BUYER subsequent to possession and therefore not tabulated in the inventory shall either be (a) paid for by BUYER or (b) rejected by BUYER and returned to shipper for credit to SELLER. ' BUYER agrees to indemnify and hold SELLER harmless for BUYER'S failure to comply with this provision. This paragraph shall survive the possession date.

2. There shall be no adjustment for yellow page advertising, utilities or telephone as BUYER is responsible for its own or shall simultaneously with closing establish its own accounts.

3. There shall be no adjustment for insurance premiums as BUYER shall obtain its own insurance.

4. Payroll (excepting for accrued wages or benefits) shall be adjusted and prorated.

5. This Article shall not preclude a separate agreement on any appropriate payments which require adjustment or proration made separately by SELLER and BUYER.

ARTICLE XVII: MISCELLANEOUS

1. All Exhibits are hereby incorporated by reference.
2. This Agreement constitutes the entire agreement and understanding of the parties and there are no other terms, conditions, warranties, representations, or inducements except as are expressly set forth herein, as set forth in the attached Exhibits or the documents executed in connection with this sale transaction.
3. Headings are for convenience only and are not an integral part of this Agreement.
4. This Agreement, executed in duplicate, shall be binding upon and shall inure to the benefit of the parties, their successors, assigns, and personal representatives.
5. The parties shall do, undertake and perform all acts and execute all documents reasonably required to carry out the requirements and provisions of this Agreement.
6. Should any party to this agreement default, the nondefaulting party shall be entitled to reasonable attorney fees and costs to enforce the terms of this agreement.
7. All notices mentioned here are to be provided in writing and sent to the last known address of the addressee.

ARTICLE XVIII: TRAINING

SELLER agrees to train BUYER during working hours for up to thirty (30) days at no charge, and to consult by telephone as needed during such period.

ARTICLE XIX: CLOSING

The closing shall be on September 12, 1990 at 9:30 o'clock a.m. at the offices of NEIDER & WARD.

ARTICLE XX: RELEASE OF LIABILITY

1. By signing this Agreement, BUYER hereby acknowledges that BUYER is relying solely on BUYER'S own inspection of the business and the representations of SELLER and not on VR BUSINESS BROKERS, hereinafter referred to as "Broker", with regard to the prior operating history of the business, the value of the assets being purchased and all other material facts of SELLER in making this offer. BUYER acknowledges that Broker has not verified, and will not verify, the representations of SELLER and should any such representations be untrue, BUYER agrees to look solely to SELLER for relief and to indemnify Broker and hold Broker harmless in connection with all losses and damages caused BUYER thereby.

2. SELLER acknowledges that Broker has made no representations concerning the credit-worthiness or ability of BUYER to complete this transaction, and relies solely on BUYER representations and not Broker with respect thereto.

ARTICLE XXI: SURVIVAL OF PROVISIONS

All provisions of this Agreement, including warranties,

representations and personal indemnities shall continue and remain in force after closing.

Time is of the essence.

DATED this 14th day of September, 1990.

SELLER:

ICELANDIC INVESTMENTS, INC.

By 
Robert Johnson, President


BUYER:

RUF, INC.

By 
President

GUARANTORS:


DONALD M. DUDLEY


WILLIAM J. GRUBER

Robert Johnson and Richard Johnson execute this Agreement below as individuals but only to the extent and as provided specifically in Article VII above.


ROBERT JOHNSON, Individually


RICHARD JOHNSON, Individually

Swings.AS

CERTIFICATE OF MAILING

STATE OF UTAH)
)Ss.
COUNTY OF SALT LAKE)

Kevin C. Timken being duly sworn, deposes and says:

That he served SUPPLEMENTAL ADDENDUM TO BRIEFS OF APPELLEES
upon the following parties by placing two true and correct copies
thereof in an envelope addressed to:

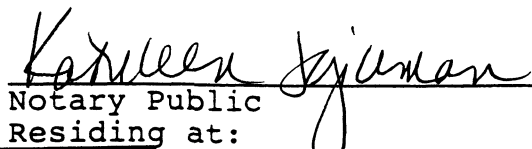
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Leslie W. Slauch
HOWARD LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84603
Attorneys for Appellees Icelandic Investments, Inc., and Robert
Johnson

and mailing the same, sealed, with first class postage prepaid
thereon, in the United States mail at Salt Lake City, Utah, on
the 24th day of SEPTEMBER, 1998.



SUBSCRIBED AND SWORN to before me this 24th day of
September 1998.


Notary Public
Residing at:

My Commission expires:

12/23/99



NOTARY PUBLIC
Kathleen J. Gillman
136 So. Main St., No. 202
Salt Lake City, Utah 84101
My Commission Expires
December 23, 1999
STATE OF UTAH